LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

Supreme Court, U.S.
FILED
AUG 18 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-141

In the Supreme Court of the United States

OCTOBER TERM, 1988

USX CORPORATION,

Petitioner,

v.

ELBERT G. GREEN AND ROBERT DANLEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RICHARD Z. FREEMANN, JR.*
CREED C. BLACK, JR.
MARK S. STEWART
BALLARD, SPAHR, ANDREWS & INGERSOLL
30 South 17th Street
20th Floor
Philadelphia, PA 19103
(215) 636-4876

Attorneys for Respondents

*Counsel of Record

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals correctly held, under settled Title VII principles and facts found by the district court, that USX Corporation's subjective interviewing process had a disparate and adverse impact on qualified black applicants for unskilled jobs.

2. Whether the court of appeals correctly held, under settled Title VII principles and facts found by the district court, that plaintiffs proved intentional discrimination on the part of USX Corporation.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. THE THIRD CIRCUIT'S RULING THAT USX'S SUBJECTIVE HIRING PRACTICE HAD A DISCRIMINATORY IMPACT ON BLACK APPLICANTS HONORS THE RULINGS OF THIS COURT	8
A. The Prima Facie Case	8
B. USX's Inadequate Response To The Prima Facie Case	13
1. The "Best Qualified" Excuse	15
2. The "Drop Out" Excuse	17
II. THE THIRD CIRCUIT'S INTENTIONAL DISCRIMINATION DECISION IS FACTUALLY CORRECT AND CONSISTENT WITH THE RULINGS OF THIS COURT	19
A. The Correct Test For Intent Was Used	20
B. There Was No Need To Remand	21
C. USX Failed To Rebut The Prima Facie Case Of Disparate Treatment	22
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES	
Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), *cert. granted in part*, 108 S. Ct. 2896 (1988)	24
Bazemore v. Friday, 478 U.S. 385 (1986)	12
Castaneda v. Partida, 430 U.S. 482 (1977)	11, 12
Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531 (9th Cir. 1982)	22
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	14
Hazelwood School District v. United States, 433 U.S. 299 (1977)	12
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1942)	19, 20
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	19, 20
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	21, 22
Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985)	21
Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)	13, 19, 20
Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983), *cert. denied*, 469 U.S. 979 (1984)	22
Watson v. Fort Worth Bank and Trust, 108 S. Ct. 2777 (1988)	*passim*
REGULATIONS	
29 C.F.R. §§ 1607.1-1607.18 (1968)	4
43 Fed. Reg. 38290	4

No. 88-141

In The Supreme Court of the United States
OCTOBER TERM, 1988

USX CORPORATION,

Petitioner,

v.

ELBERT G. GREEN AND ROBERT DANLEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Elbert G. Green and Robert Danley, individually and as representatives of a class of persons similarly situated, respectfully pray that this Court deny the petition of USX Corporation ("USX") seeking a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit entered on March 29, 1988.

COUNTERSTATEMENT OF THE CASE

This Title VII and Section 1981 class action was filed many years ago on behalf of over 10,000 black men and women who, after July 10, 1972, applied without success for unskilled laborer jobs at the Fairless Hills, Pennsylvania, steel plant of USX Corporation ("USX"). The qualifications of white applicants for those jobs were no better than those of black applicants. Nonetheless, using a subjective interviewing process described by the courts below as "bizarre" and "unseemly," USX hired a disproportionately large number of whites to fill thousands of the unskilled jobs in question.

When USX (then United States Steel Corporation) opened its huge steel-making plant at Fairless Hills in the early 1950s, race discrimination in employment was widely practiced in this country. USX was no exception. Indeed, despite passage of the Civil Rights Act of 1964, USX's work force at Fairless Hills remained almost all white throughout the 1970s.[1] Thus, USX faced many discrimination cases. Among them, the EEOC and the Attorney General of the United States sued USX in 1974 in a complaint alleging a pattern and practice of race and sex discrimination violations of Title VII and Executive Order 11246.[2] By the mid-1970s, almost fifty

[1]Petitioner's description of its Fairless Hills plant as an "integrated steel mill" can only mean in the industrial sense. Pet. 2. (For convenience, the abbreviations listed in the petition at page 3, footnote 3, are used herein. Reference to the petition will be designated "Pet.")

[2]To settle that suit, USX entered into two consent decrees in 1974 which permanently enjoined the company from discriminating in employment on the basis of race, color, or sex. The consent decrees also limited the use of unvalidated employee selection criteria; ordered the payment of substantial back pay to employees; and prohibited destruction of hiring records for at least three years.

separate EEOC charges of race discrimination had been filed against USX's Fairless Hills plant. Plaintiffs filed this race discrimination class action in 1976.

Still, USX's business was thriving. Between 1972 and 1982, the company hired over 5,000 people to work in its Fairless Hills plant as unskilled laborers, the most menial job in the Production & Maintenance department ("P & M"). Ninety percent of USX's laborer hiring occurred in the years 1972, 1973, 1974, 1978 and 1979.[3]

To be hired as an unskilled laborer, USX required only that the applicant be at least 18 years old, able to read basic safety signs, and able to pass a physical exam. Indeed, USX advertised the laborer job in newspapers as requiring nothing more than "common sense and a desire to work"; "no experience" was required. Black and white applicants possessed these few requirements equally.[4]

---

[3]USX did virtually no hiring in 1975, 1980 and 1981. In 1976, USX faced Title VII suits, numerous EEOC charges of race discrimination, and close government scrutiny resulting from the consent decrees it had executed. To counter these pressures, for a short time USX consciously increased its hiring of blacks to a level that avoided discrimination. LFF 52 (App. B, 67a-68a). However, by 1978 and 1979 blacks were again subject to overwhelming employment barriers at USX. As the trial court noted, "when the pressure to meet consent decree goals lessened after 1976, the rate of black hires quickly sank back nearly to its former level." App. B, 104a.

[4]The district court found

> no evidence from which I could reasonably conclude that blacks, on the average, are less qualified to be laborers in steel mills than whites. . . . To the extent defendant's argument suggests I should take judicial notice of the inferior qualifications of blacks, it is morally and legally offensive.

App. B, 100a-101a.

When one of USX's departments at the steel plant needed unskilled laborers, the department foreman would notify the personnel department. Personnel clerks would then schedule interviews of persons who had previously submitted applications. After clearing preliminary interviews in the personnel office, applicants were given final interviews by the foremen in the department having the vacancies. The foremen had unfettered power to accept or reject applicants and relied on nothing more than "gut level" reactions. App. B, 102a.

USX argued that its foremen interviewed using some twenty amorphous factors, including "attitude," "initiative," "personality," "alertness," "intelligence," "interest," and "personal references." But the foremen were never "trained in any way as to what the different criteria meant or how to implement them uniformly." LFF 39 (App. B, 64a). Nor did USX ever make any attempt to determine whether these vague criteria were job related.[5] Significantly, USX's own employment manual specifically banned the use of subjective factors like "alertness" and "general ability."

Moreover, USX's employment manual required that a special "Reviewer's Remarks" form be completed to explain why an applicant was rejected. USX and its foremen, however, "largely ignored" this requirement. App. B, 102a. Indeed, in violation of its consent decree

[5]The consent decrees which settled the United States Government's Title VII suit against USX directed the company not to use unvalidated hiring criteria. LFF 41, 42 (App. B, 65a). EEOC guidelines also prohibited the use of unvalidated criteria. Uniform Guidelines On Employee Selection Procedures (1978), 29 C.F.R. §§ 1607.1-1607.18 (1968). *See also* 43 Fed. Reg. 38290 (1978) (discussing EEOC guidelines adopted in 1966 to advise employers on permissible employee selection criteria).

and EEOC obligations, USX destroyed the few "Reviewer's Remarks" forms that had been prepared on unsuccessful applicants.[6] As a result, the foremen at USX never had to explain why they favored white applicants over blacks.

The district court characterized the situation this way:

> [W]hen relatively vague subjective standards are given to a large number of individuals to be applied in whatever manner they see fit, with no systematic review to ensure fairness, the chances are great that conscious or unconscious racial bias on the part of some of those individuals will tinge the selection process.

App. B, 97a.

The evidence at trial showed that USX's system caused extraordinary statistical disparities. Black men and women submitted 26% of the 50,000 applications considered for laborer jobs during the decade. The ratio of black applicants called for final interviews with foremen was consistent with the ratio of blacks submitting applications. However, of the 5,000 unskilled laborers USX's foremen employed during the five primary years of hiring, only 16% were black. The hiring advantage USX gave to white applicants over blacks was extreme, ranging yearly from 47% to 85%. Measured in terms of the overall opportunity to be hired by USX, a white

[6]As charges of race discrimination mounted, the company destroyed many other employment documents, too. USX threw out the thousands of applications from unsuccessful candidates it considered between 1972 and 1974, when almost two-thirds of the class period hiring occurred. USX also destroyed most of the Daily Call-In Logs showing the race of individuals scheduled for interviews, as well as the Job Applicant Log for 1972.

laborer applicant had a 72% "edge" over an equally qualified black applicant.[7]

The overall "shortfall" in USX black hiring—meaning the number of laborer jobs which blacks deserved but which USX gave to whites--was in excess of 400. This shortfall had a statistical value more than 14 standard deviations below what one would expect if the system were fair. Standard deviations of this magnitude mean that there is less than one chance in 100,000 that the event occurred by chance, yielding virtual certainty that the shortfall was no accident.

Following years of discovery and lengthy trials on liability and damages, USX was found liable for race discrimination.[8] Substantial monetary and injunctive relief was awarded to the class. Both the trial court and the court of appeals concluded that USX's wholly subjective hiring process violated Title VII because it had a disparate impact on blacks. Relying upon facts found by the trial court, the court of appeals also determined that USX was liable under the disparate treatment test. USX's petition to the Third Circuit for a rehearing *in banc* was denied. App. D, 188a.

REASONS FOR DENYING THE WRIT

This twelve year old case with peculiar and distressing facts does not merit a writ of certiorari. No important unsettled question of federal law is presented. The

[7]Even USX's expert admitted that USX gave white applicants an "edge" over blacks when hiring. LFF 119 (App. B, 89a).

[8]The district court said: "[P]laintiffs have proved that disproportionately few black applicants were hired for entry-level P & M jobs, overall during the class period and during 1972, 1973, 1974, 1978, and 1979 in particular, in relation to the number of blacks in the applicant pool for these jobs. . . . I find that the shortfall in black hiring was statistically significant." LFF 104 (App. B, 83a-84a).

unanimous liability decision rendered by the Third Circuit Court of Appeals does not conflict with any decision of this Court. Because USX was found liable under two distinct legal theories, the outcome of this suit will not change unless this Court reverses the Third Circuit on both its disparate impact and disparate treatment rulings. What USX is really complaining about are the factual rulings establishing its liability.

For years, USX stubbornly maintained in the courts below that the disparate impact test of Title VII liability could not be used to challenge its subjective hiring practice. Both the trial and appellate courts disagreed. In *Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2787 (1988), this Court, too, unanimously rejected USX's contention, ruling that "subjective or discretionary employment practices may be analyzed under the disparate impact approach. . . ."

Staggered by *Watson's* impact, USX has been left combing the record in a frantic attempt to create some other issue that might enable it to escape accountability for its discrimination. Thus, USX weakly contends that the courts below misapplied the procedural "burden shifting" guidelines (prima facie case, rebuttal, etc.) when analyzing USX's conduct under the disparate impact and disparate treatment tests.[9]

As to the disparate impact ruling against it, USX cites views expressed in the plurality opinion in *Watson*, and argues that its liability should be erased

[9]This Court in *Watson* "cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence. . . ." 108 S. Ct. at 2784. The Third Circuit agreed: "[these formulae] are simply tools designed to aid in the analysis of evidence. The ultimate question remains whether the defendant has discriminated." App. A, 21a.

because plaintiffs did not "isolate and identify the challenged employment practice and demonstrate a causal connection between that practice and a racially unequal result." Pet. 12. USX's statement is factually incorrect.

As to the disparate treatment ruling against it, USX incorrectly contends that the Third Circuit exceeded its authority and imposed an improper burden of proof upon USX. Pet. 18, 23-24.

The truth is that the courts below showed striking foresight in their liability rulings against USX. Their analyses are in complete harmony with the teaching of *Watson* that subjective criteria can be tested under the disparate impact approach. By insuring that the plaintiffs always carried the proper burden of proof, the courts below carefully avoided becoming entangled in those few procedural issues which separated *Watson's* plurality and concurring opinions. Certiorari is not warranted.

I. THE THIRD CIRCUIT'S RULING THAT USX'S SUBJECTIVE HIRING PRACTICE HAD A DISCRIMINATORY IMPACT ON BLACK APPLICANTS HONORS THE RULINGS OF THIS COURT.

A. The Prima Facie Case.

In addition to the unanimous central holding in *Watson*, seven justices agreed that to make out a prima facie case of disparate impact, plaintiffs must show that a facially neutral hiring practice selects applicants in a significantly discriminatory pattern. *See Watson*, 108 S.

Ct. at 2791-92 (Blackmun, J.).[10] Three concurring justices did not offer evidentiary guidelines on how to prove such a prima facie case. The plurality of four did state their views on what kind of evidence can be used to establish a prima facie case of disparate impact. Plaintiffs should (a) "begin by identifying the specific employment practice that is challenged," *id.* at 2788, and (b) then "offer statistical evidence of a kind and degree sufficient to show that the practice in question caused the exclusion of applicants for jobs . . . because of their membership in a protected group," *id.* at 2788-89.

Plaintiffs' prima facie case of disparate impact against USX was entirely consistent with both the plurality's views and earlier Supreme Court rulings. Contrary to USX's contention, Pet. 13, plaintiffs *did* identify the USX employment practice they were challenging. As the Third Circuit noted:

> In the present case, the class has identified one "specific procedure" or "selection criteri[on]," namely the requirement that prospective employees "pass" an interview with P & M foremen, that results in the disparate hiring.

App. A, 17a n.10. The evidence at trial clearly established that qualified blacks were disproportionately excluded during interviews with foremen.

USX may be suggesting here, as it did below, that it is not enough that plaintiffs show that the disparate impact was caused by subjective foremen interviews.

[10]Justice Kennedy did not participate in the decision. Justice Stevens took no position on the evidentiary standards to be applied to disparate impact cases involving subjective employment criteria. *See Watson*, 108 S. Ct. at 2791, 2797.

USX would require plaintiffs to identify which specific subjective criterion—such as "initiative" or "attitude" —resulted in the disproportionate exclusion of blacks. There are at least three reasons why USX's position is wrong.

First, this Court has never suggested that such an unrealistically sharp focus is required. In *Watson*, sufficient specificity was found where plaintiffs' challenge was to the bank's practice of relying on the "subjective judgment of supervisors who were acquainted with the candidates and with the nature of the jobs to be filled." 108 S. Ct. at 2782.[11]

Second, plaintiffs could not have shown specifically which subjective interview factors controlled because USX, itself, would not say which ones governed. As the trial court noted, "[f]urther refinement of plaintiffs' definition of the hiring selection system they attack was made impossible by defendant's own refusal to be pinned down as to the selection criteria it employs, beyond listing the twenty subjective criteria . . . and stating that these criteria were applied as an 'amalgam.' " App. B, 98a.[12]

Third, any opportunity for plaintiffs to be more specific about why the foremen disproportionately favored whites was thwarted by USX's practice of neglecting to

[11]The Third Circuit rejected USX's position as seeking a "strained level of specificity." App. A, 17a n.10.

[12]In his concurring opinion in *Watson*, 108 S. Ct. at 2797 n.10, Justice Blackmun aptly stated:

> Nor can the requirement that a plaintiff in a disparate impact case specify the employment practice responsible for the statistical disparity be turned around to shield from liability an employer whose selection process is so poorly defined that no specific criterion can be identified with any certainty, let alone be connected to the disparate effect.

keep or destroying interview and other records in violation of the consent decrees, EEOC guidelines, and USX's own policies.[13]

Clearly, plaintiffs identified, with all the specificity required or possible, the USX employment practice causing the tremendous disparity—subjective foremen interviews.

Sensing the weakness in its opening argument, USX next asserts that even if plaintiffs did sufficiently identify the practice, their prima facie case was still flawed because plaintiffs failed to "prove that the cause of the disparity between the number of black hires and black applicants was any employment practice of USX." Pet. 13. That assertion, which tries to mimic the second prong of the evidentiary approach suggested by the *Watson* plurality, is nothing short of incredible in light of the staggering statistics which were presented by plaintiffs at trial; accepted by the district court; not challenged by USX on appeal; and fully credited by the court of appeals.[14]

Plaintiffs' expert statistician employed four different statistical methods to test USX's subjective hiring, adjusting his analysis to take into account variations that could have affected the accuracy of his conclusions. His

[13]As Justice Blackmun also observed in *Watson*, an employer who complies with the EEOC's record keeping requirements and "keeps track of the effect of its practices on protected classes, will be better prepared to document the correlation between its employment practices and successful job performance when required to do so by Title VII." *Watson*, 108 S. Ct. at 2796.

[14]This Court has stressed "the useful role that statistical methods can have in Title VII cases . . . ," *Watson*, 108 S. Ct. at 2789 n.3, and previously observed that "greater than two or three standard deviations" is significant, *Castaneda v. Partida*, 430 U.S. 482, 497 n.17 (1976).

analysis considered the minimal job qualifications involved, the possibility of clerical errors in recording an applicant's race, the fact that some people submitted more than one application, the possibility that some applications were missing, the length of time USX treated applications as active, and other factors.[15] Each of his methods showed standard deviations greater than -4, and the overall shortfall of black hires exceeded -14 standard deviations. Each method demonstrated that USX's subjective interviewing practice had a statistically significant adverse effect upon blacks. In short, plaintiffs did present compelling statistical evidence "that the practice in question . . . caused the exclusion of applicants for jobs . . . because of their membership in a protected group." *Watson,* 108 S. Ct. at 2789.[16]

Ironically, at trial USX's own statistical evidence confirmed the bias in its system. The district court noted that "two defense experts . . . confirmed that the analyses [plaintiffs' expert] performed in relation to the overall P & M applicant pool were appropriate, and that the results he obtained were reliable, given his data and assumptions." App. B, 78a. Indeed, one USX expert tes-

[15]Although in *Bazemore v. Friday,* 478 U.S. 385, 400 (1986), this Court ruled that a plaintiff's statistical proof need not account for "all measurable variables thought to have an effect" on the employer's decision, the district court here found that plaintiffs' statistics accounted for every significant variable. LFF 63, 83, 104 (App. B, 72a, 77a-78a, 83-84a).

[16]Although it never challenged plaintiffs' statistics in the Third Circuit, App. A, 12a n.7, USX now attacks them on the grounds that they "only eliminated chance as the cause of the disparity." Pet. 13. Where tests of statistical significance eliminate chance as a possible explanation for a disparity in hiring, courts will presume that the differences are attributable to discriminatory practices. *See Hazelwood School District v. United States,* 433 U.S. 299, 308-09 n.14 (1977); *Castaneda,* at 496-97 n.17 (1977). Plaintiffs' statistics amply established the requisite "inference of causation." *See Watson,* 108 S. Ct. at 2789.

tified that in USX's hiring system "being white gave an applicant an 'edge,' that is, an increased possibility of being hired." LFF 119 (App. B, 89a).[17]

Thus, the Third Circuit properly concluded that plaintiffs had made out a prima facie case of disparate impact against USX. That prima facie case satisfied all the evidentiary guidelines suggested by this Court's earlier decisions and the *Watson* plurality. Thus USX was obligated to rebut the prima facie case or suffer liability.

B. USX's Inadequate Response To The Prima Facie Case.

Watson also addressed the employer's obligation to respond to a prima facie case of disparate impact. The plurality says the employer must "produce evidence" or "show" that "its employment practices are based on legitimate business reasons." 108 S. Ct. at 2790, 2791. According to the concurring opinion, the employer must "prove" that the challenged practice is a business necessity. *Id.* at 2792. These differences are of no benefit to USX because both the plurality and concurring views would clearly agree that the employer must produce at least some legitimate evidence to rebut a prima facie case. As this Court stated in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981), the employer's "explanation of its legitimate reasons must be clear and reasonably specific." While the employees always bear the ultimate burden of proof, an

[17]There was really no way for USX to mount a legitimate attack on plaintiffs' statistics. Unlike *Watson*, the statistics here were based on a huge sample of almost 50,000 applicants. Moreover, there were no meaningful job qualifications so the sample was not tainted by individuals "lacking normal qualifications for the job." *Cf. Watson*, 108 S. Ct. at 2790. Indeed, the district court concluded that "virtually all applicants possessed the minimum qualifications." LFF 63 (App. B, 72a).

employer cannot rebut a prima facie case merely by uttering some unfounded or specious excuse—plausible facts are needed.[18]

In an attempt to gloss over the flaws in its rebuttal, USX misreads the plurality opinion in *Watson* to suggest that once an employer offers any explanation for the disparity, however nonsensical, the court must move on to step three and determine whether the plaintiffs have proved "that other selection devices would serve USX's legitimate interests in choosing the best qualified employees." Pet. 15.

The *Watson* plurality's suggestion that an employer need only "produce evidence" explaining the disparity cannot be read to mean that the trial court must accept the employer's excuse without question. If the employer's claims are so fanciful that they collapse from their own weight, or through cross examination or other evidence are shown to be pretextual, the employer has not rebutted the prima facie case. When this failure occurs, the plaintiffs have satisfied their ultimate burden of proof and liability is established.

At trial USX offered two explanations for why blacks suffered: (1) "the class members' qualifications were less than those of the applicants ultimately hired; and (2) . . . a greater proportion of black applicants

[18]The company's assertion, Pet. 8, 15, that it was required to "prove" that its excuses were valid is not supported by the record. The standard employed by the district court, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was that USX had "to explain" or make a "showing" that its subjective interviews served a legitimate business purpose. App. B, 100a-101a. The Third Circuit only required USX to "articulate[ ] a sufficient non-discriminatory reason to rebut the inference that its hiring practice was discriminatory." App. A, 34a. USX never had the ultimate burden of proof.

voluntarily 'dropped out' of the hiring process. . . ." App. A, 34a. For factual reasons discussed below, both the district court and the court of appeals concluded that these contentions were "wholly without merit." Indeed, the Third Circuit found the record was "completely devoid of evidence" to support either USX position.[19] App. A, 34a-35a.

1. The "Best Qualified" Excuse.

USX's "best qualified" claim was that although there were no meaningful job requirements, the company made substantive evaluations of laborer applicants and chose those with greater potential for promotion. USX claimed that its disproportionate hiring reflected the fact that white applicants were better qualified for promotion than black applicants.[20]

The district court found that USX's subjective interview system did *not* identify the "best qualified" candidates.

> [T]he process by which [USX] divined who, among its applicants, were the best qualified was wholly subjective, consisting essentially of combining the gut reactions to the applicant of employees in the personnel office and one or more foremen in the plant. No evidence was presented or offered to

[19]USX's failure to produce evidence of a legitimate business purpose for hiring practices that exclude blacks obviates any need to address whether plaintiffs were required to show that a different practice, without an undesirable racial effect, could also serve USX's needs. *Cf. Watson*, 108 S. Ct. at 2790. Suffice it to say that more effort toward record-keeping (and less toward record destruction), greater emphasis on training foremen, and better monitoring of the results of USX's subjective hiring practices might have avoided the discriminatory effects.

[20]USX's reliance on this issue is undercut by the company's discovery abuses before trial. The district court ruled that USX "had foreclosed plaintiffs from inquiring into the issue of promotability as a hiring criterion during discovery. . . ." LFF 110 (App. B, 86a).

> show that applicants were tested in any way for ability to do specific tasks required of workers above the laborer level.

LFF 110 (App. B, 87a).

Indeed, USX's own witnesses destroyed its "best qualified" claim. USX introduced a study performed by an expert, Dr. Finis Welch, to "show" that USX's hiring reflected differences in applicants' qualifications rather than racial bias. The district court described Dr. Welch's report this way:

> If the Winner/Loser study revealed anything about what [USX] looked for in its applicants, it showed that [USX's] conduct was bizarre. Dr. Welch found that an applicant who had spent 7 of the past 10 years working as a manufacturing operative had no better chance of hire at [USX] than a person who had never worked a day in his life. He found that an applicant with one year of experience as an assembly line worker in an ice cream plant was *more* likely to be hired by [USX] than an applicant with 10 years of experience as a steel mill laborer. He found that applicants who had a college degree or some college training had a reduced chance of hire at [USX], as did applicants who had clerical experience. Ironically, he found that being white gave an applicant an "edge," that is, an increased possibility of being hired.

LFF 119 (App. B, 89a) (emphasis in original). The court concluded that:

> The Winner/Loser study did not show any relationship between the variables Dr. Welch measured and successful performance on P & M jobs. It did not attempt to determine whether the multitude of criteria [USX] used were job-related. Nor

> did it purport to show that blacks were less qualified than non-blacks, under [USX's] or any other criteria.

LFF 121 (App. B, 90a).

The court of appeals agreed that "USX articulated no logically comprehensible standard that it used to identify applicants who were 'better qualified' to do the jobs for which USX was hiring"; that "the evidence that was presented by USX negated the [best qualified] contention"; and that "the [USX] hiring process was unseemly." App. A, 35a-36a.

Thus, USX never produced any real "evidence that its employment practices are based on legitimate business reasons." The courts below properly determined that USX's "best qualified" argument had no factual merit.

2. The "Drop Out" Excuse.

USX's second explanation for its hiring bias was that a disproportionately large share of black applicants voluntarily withdrew from the hiring process. USX introduced this excuse through testimony from a low-level employee with no statistical expertise who claimed to have reviewed some hiring data for the years 1973 and 1974. From these he concluded that over the entire decade USX had offered blacks a statistically proportionate number of "job opportunities."

Rejecting the witness' story as "unreliable," LFF 126 (App. B, 91a), the district court cited testimony from Larry Edwards, USX's head of personnel, who testified that "there were no reliable [USX] records from which

rates of applicant dropouts or failures of physical exams could be determined." LFF 127 (App. B, 91a). Moreover, Edwards testified that in his experience the "phenomenon of 'dropping out' during the interview process, or after a job offer had been extended, occurred 'across the board,' and . . . did not occur disproportionately often among blacks." LFF 127 (App. B, 91a-92a). Rebuttal testimony from the plaintiffs' expert also exposed the fiction of USX's defense. LFF 130 (App. B, 92a-93a).[21]

After considering all the evidence, the district court therefore concluded that USX's "drop out" excuse "had not explained the statistically significant shortfall in black hiring for entry level P & M jobs. . . ." LFF 132 (App. B, 93a). The court of appeals agreed that the "drop out" excuse was "not supported by the evidence of record." App. A, 37a.

Faced with these factual determinations, the position USX now peddles is that this Court should reverse because the company was required to do more in response to plaintiffs' prima facie case than merely utter some excuse having no factual basis. USX's position grossly misreads the decisions of this Court and ignores the speciousness of the "excuses."[22] The courts below properly reviewed and rejected USX's excuses and there is no reason for this Court to engage in a further review.

---

[21]This rebuttal testimony belies USX's contention that "plaintiffs offered no evidence disproving USX's defenses or proving that they were pretexts. . . ." Pet. 24.

[22]As Justice Blackmun's concurring opinion noted, a prima facie case cannot be rebutted by "the bald assertion that a purely discretionary selection process allowed [it] to discover the best people for the job, without any further evidentiary support." *Watson*, 108 S. Ct. at 2796.

II. THE THIRD CIRCUIT'S INTENTIONAL DISCRIMINATION DECISION IS FACTUALLY CORRECT AND CONSISTENT WITH THE RULINGS OF THIS COURT.

The Third Circuit also found Title VII liability against USX under the disparate treatment theory. In the process, it found that the district court had applied the wrong legal standard for "intent." Accepting the facts found by the district court, the appellate court carefully reviewed the record to determine: (1) whether plaintiffs had made out a prima facie case of disparate treatment; and (2) whether USX had "articulated a sufficient non-discriminatory reason to rebut the inference that its hiring practice was discriminatory." App. A, 34a. In so doing, the Third Circuit scrupulously honored the burden-shifting process which this Court has consistently recommended for the analysis of treatment claims. *See, e.g., Watson,* 108 S. Ct. at 2784; *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973).

USX argues that the Third Circuit erred in concluding, based upon facts proven at trial, that USX engaged in disparate treatment of thousands of blacks who applied for laborer jobs. That USX feels it must make such a tenuous argument is understandable. USX knows that the judgment below will remain undisturbed unless it convinces this Court to reverse its liability under both the disparate impact and disparate treatment theories.

USX's attack on the treatment ruling is essentially three-fold: (1) that the Third Circuit used the wrong legal standard for intent; (2) that the Third Circuit

should have remanded the case, leaving to the district court the ultimate question of whether the proven discrimination was intentional; and (3) that too heavy a burden was put on USX to rebut the prima facie case of intentional discrimination. Pet. 17-25. These arguments have no merit.

A. The Correct Test For Intent Was Used.

The Third Circuit concluded that the district court had "misconstrued the appropriate legal standard regarding discriminatory intent. . . ." App. A, 29a. The district court had placed upon the plaintiff class a "much more onerous burden" (App. A, 29a) than controlling decisions of this Court dictated. Citing *Burdine, Teamsters* and *McDonnell Douglas*—the very decisions which USX now contends were ignored—the court of appeals observed that plaintiffs had introduced "abundant circumstantial evidence from which the inference of discriminatory treatment can reasonably be drawn." App. A, 30a.[23] The district court's legal error was in requiring plaintiffs to prove that USX had an "invidious purpose" or a "hostile motive." *Id.*

In its petition, USX does not explain what it believes was wrong with the legal standard used by the Third Circuit. Rather, its argument appears to be that the plaintiffs' statistical evidence was, in USX's view, "insufficient to support an inference of discrimination." Pet. 20-21.

USX's contention that plaintiffs "relied solely on gross cumulative statistics to prove intentional discrimination," Pet. 24, flagrantly mischaracterizes the facts

[23]In *Watson* this Court reiterated that the "burden of proving a prima facie case is 'not onerous.' " 108 S. Ct. at 2784.

of this case. Plaintiffs' proof extended far beyond statistics. It included evidence of USX's racial segregation of job applications; its destruction of crucial employment records; its unguided use of a purely subjective interview process; "race-conscious" adjustments to its hiring process; USX's refusal to take any remedial action despite knowledge that its system was excluding blacks; and anecdotal evidence of discrimination.[24]

It was all this evidence, along with the extraordinary statistical racial disparity in USX's hiring, which satisfied the Third Circuit that plaintiffs had established a prima facie case of intentional discrimination. App. A, 32a.[25]

B. There Was No Need To Remand.

Based on a distorted reading of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), USX contends that the Third Circuit should have remanded the case to the district court to make the "ultimate finding of fact on discriminatory intent." Pet. 23. Ironically, in *Pullman-Standard* this Court specifically approved what the court of appeals did here.

---

[24]Legally, no anecdotal evidence is necessary to establish a prima facie treatment case. *Segar v. Smith*, 738 F.2d 1249, 1278-79 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Nonetheless, Sheila Walker, a USX employee, did testify about instances where USX foremen remarked that they "had enough" blacks and "did not want any more"; and where one USX foreman "just said he didn't want to take all of these black girls, because they all looked alike and he didn't want any more." P-176 at pp. 5480, 5488-5489 (J.A. 362, 370-371).

[25]The district court's finding that certain USX employees had no racial animus does not, as USX suggests, translate into a finding that the foremen had no intent to discriminate. To the contrary, the district court characterized the foremen's behavior as "subtle and perhaps unconscious discrimination against black applicants." App. B, 103a.

> The Court of Appeals, therefore, was quite right in saying that if a district court's findings rest on an erroneous view of the law, they may be set aside on that basis. But here the district court was not faulted for a misunderstanding or applying an erroneous definition of intentional discrimination.

456 U.S. at 287. *See also Thorne v. City of El Segundo*, 726 F.2d 459, 464 n.5 (9th Cir. 1983) ("whether the plaintiff's proof established a prima facie case . . . is a legal conclusion freely reviewable on appeal."), *cert. denied*, 469 U.S. 979 (1984) (quoting *Gay v. Waiters' and Dairy Lunchmen's Union*, 694 F.2d 531 (9th Cir. 1982)).

The Third Circuit adhered to the *Pullman-Standard* rule, applied the proper legal standard to the findings of fact made by the district court, and concluded that plaintiffs had proven intentional discrimination.

> We note here that our conclusion that the district court's decision was in error is not founded upon the "clearly erroneous" standard of factual review. Rather, we find that the district court misconstrued the appropriate legal standard regarding discriminatory intent in reaching its result. Therefore, our review is of its *legal* and not its *factual* conclusion, and our standard of review is plenary. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

App. A, 29a n.12 (emphasis in original). Under these circumstances no remand was necessary or warranted.

C. USX Failed To Rebut The Prima Facie Case Of Disparate Treatment.

Lastly, USX challenges the manner in which the court of appeals determined that the company had not rebutted the plaintiffs' prima facie case of disparate treatment.

USX contends that the Third Circuit imposed the ultimate burden of proof on USX. Pet. 18, 23-24. That position is certainly not supported by the record or the opinions below. *See, infra,* p. 14 n.18.

At trial, USX offered the hollow "best qualified" and "drop out" excuses in an attempt to rebut the plaintiffs' prima facie case of disparate treatment. *See, infra,* pp. 15-18. As the Third Circuit stated:

> Both of these arguments were explicitly rejected by the district court. Our review of the record reveals that the district court was correct in concluding that these assertions are wholly without merit, and we find them pretextual.

App. A, 34a-35a.[26] The rebuttal burden that the court of appeals imposed upon USX—to articulate a sufficient non-discriminatory reason (App. A, 34a)—was entirely consistent with the governing decisions of this Court. USX's problem was that it simply could not muster any fact to rebut the prima facie case of disparate treatment. That is why USX was found liable. There were no errors of law.

CONCLUSION

The Third Circuit found that USX's subjective hiring practices discriminated against thousands of blacks under both the disparate impact and disparate treatment methods of analysis recognized by this Court. The decisions of the Third Circuit in this intensely factual case

[26]The case was tried before the district court as one involving intentional discrimination, and USX had every chance to rebut the plaintiffs' claims. The Third Circuit recognized that the disparate treatment claim "was fully litigated, and therefore USX had a complete opportunity, and an obligation, to present its case refuting the class's allegation." App. A, 34a n.15.

are in full accord with the rulings of this Court. The conduct of USX was in direct conflict with all of the principles underlying Title VII. The writ should be denied.[27]

Respectfully submitted,

RICHARD Z. FREEMANN, JR.*
CREED C. BLACK, JR.
MARK S. STEWART
BALLARD, SPAHR, ANDREWS & INGERSOLL
30 South 17th Street
20th Floor
Philadelphia, PA 19103
(215) 636-4876

Attorneys for Respondents

*Counsel of Record

[27]The Court's recent decision to address the question whether the disparate impact model may be used to challenge the cumulative effects of a wide range of employment practices has no bearing on this case. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987), *cert. granted in part*, 108 S. Ct. 2896 (1988). The *Atonio* plaintiffs mounted an attack against myriad discriminatory practices, including hiring, promotion, work assignments, housing, pay differentials, rehire preferences, and termination. The use of subjective hiring criteria was only one of sixteen challenged practices. Unlike *Atonio*, this case involves a single practice—hiring interviews using subjective factors.

To equate *Atonio* and this case in any fashion would be entirely unwarranted and unfair to the thousands of plaintiff class members in this action who have been victimized for years by USX's wholly meritless conduct.